



UNIVERSITY OF
TORONTO
FACULTY OF LAW

CLASS ACTIONS

CASES, MATERIALS AND NOTES

(2 VOLUMES)

2009

VOLUME II

Prepared by Garry D. Watson, Professor of Law, Osgoode Hall Law School, York University

and

Jacob Ziegel, Professor of Law Emeritus, University of Toronto Faculty of Law

With the assistance of Derek McKay LL.B (OHLS Class of 2005), Now of Roy Elliott Kim O'Connor LLP, and Karim Amlani (J.D., 2011, University of Toronto)

FOR U of T STUDENT USE ONLY – NOT FOR OUTSIDE SALE





CLASS ACTIONS

CASES, MATERIALS AND NOTES

(2 VOLUMES)

2009

VOLUME II

Prepared by Garry D. Watson, Professor of Law, Osgoode Hall Law School, York University

and

Jacob Ziegel, Professor of Law Emeritus, University of Toronto Faculty of Law

With the assistance of Derek McKay LL.B (OHLS Class of 2005), Now of Roy Elliott Kim O'Connor LLP, and Karim Amlani (J.D., 2011, University of Toronto)

FOR U of T STUDENT USE ONLY – NOT FOR OUTSIDE SALE



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

KA – August 1, 2009

MATERIALS FOR CLASS ACTIONS CASEBOOK

TABLE OF CONTENTS

PREFACE	Page viii
SELECTED BIBLIOGRAPHY (Only texts, not periodicals)	x

Volume 1

Chapter 1. EVOLUTION OF CLASS ACTION LAW

A. *Common Law and Institutional Background*

<i>Naken v. General Motors of Canada Ltd.</i>	2
<i>Western Canadian Shopping Centres Inc. v. Dutton</i> (extract)	21
Jacob Ziegel, “Consumer Protection in Canada and the Class Action Remedy”	24

B. *Class Action Objectives*

Extract, Ontario Law Reform Commission, “Major Goals of a Class Action: An Evaluation”	38
--	----

C. *Class Action Legislation*

<i>Class Proceedings Act</i> , S.O. 1992 c. 6.	55
<i>Ontario’s CPA v. BC’s CPA (and legislation in the other provinces)</i>	76
<i>A comparison between certification under the Ontario Class Proceedings Act and U.S. Rule 23</i>	80
<i>Certification In Quebec: A Special Case</i>	83

D. *Impact of Canadian Legislation*

Watson, “Class Actions: The Canadian Experience”	86
--	----

Chapter 2. REQUIREMENTS FOR CERTIFICATION

A. *Identified Plaintiff*

<i>Ragoonanan Estate v. Imperial Tobacco Canada Ltd.</i>	96
Beppi Crosariol, “How Milk Soured Quebec on Class Actions...”	97
Note on Consumer Organizations as Plaintiffs in Quebec Class Actions	99

B. *Identifiable Class*

<i>Bywater v. Toronto Transit Commission</i>	100
<i>Ragoonanan Estate v. Imperial Tobacco Canada Ltd.</i>	101
<i>Taub v. Manufacturers Life Insurance Co.</i>	114

C. *Cause of Action and Common Issues*

<i>Arenson v. Toronto (City)</i>	116
<i>Caputo v. Imperial Tobacco Ltd.</i>	126
<i>Fresco v. Canadian Imperial Bank of Commerce</i>	130

D. *Cause of Action and Restitutionary Claims*

<i>Serhan Estate v. Johnson & Johnson</i>	157
H. Michael Rosenberg, Extract of “Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings”	177

E. *Adequacy of Representation*

<i>1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.</i>	182
<i>Reid v. Ford Motor Co</i>	187

F. *Preferable Procedure*

<i>Cloud v. Canada (Attorney General)</i>	189
---	-----

G. *Supporting Affidavit Evidence*

Watson, ‘What the SCC Said’	196
Watson and McKay, “Requirement and Use of Evidence on Certification”	196

H. *Cost Benefit Analysis: Superiority of Class Action Remedy*

<i>Hollick v. Metropolitan Toronto (Municipality)</i>	205
<i>Rumely v. British Columbia</i>	217

I. *Declaratory Class Actions*

<i>Roach v. Canada (Attorney General)</i>	230
Garry Watson, Class Actions Not Needed To Secure Class-Wide Declaratory Relief for Breach of Statutory Duties	236

J. *Ward Branch & Rodney L. Hayley, An Insider's Guide to Class Certification*

239

Chapter 3. CERTIFICATION BY TYPE OF CASE

A. *Product Liability*

Introductory Note	256
<i>Andersen v. St. Jude Medical Inc.</i>	258
Notes and Questions	277

B. *Misrepresentation of Product or Service*

<i>Mouhteros v. DeVry Canada Inc.</i>	299
<i>Kumar v. Mutual Life Assurance Co. of Canada</i>	300
<i>Williams v. Mutual Life Assurance Co.</i>	301
<i>Collette v. Great Pacific Management Co.</i>	316

C. *Systemic Negligence*

<i>Egglestone v. Barker</i>	325
-----------------------------	-----

Chapter 4. CERTIFICATION BY TYPE OF CASE (CONT.)

A. *Environmental Claims*

<i>Pearson v. Inco. Ltd. (S.C.J.)</i>	343
<i>Pearson v. Inco. Ltd. (O.C.A.)</i>	384

B. *Securities Litigation*

Ward Branch, “Securities Class Actions in Canada: Haven or Hinterland”	412
<i>Carom v. Bre-X Minerals Ltd.</i>	420
Note on Recent Amendments to the <i>Ontario Securities Act</i>	421
<i>Kerr v. Danier Leather Inc.</i>	422
<i>In re Nortel Corp. Securities Litigation</i>	423
Notes and Questions	424
John C. Coffee Jr. “Reforming the Securities Class Action: An Essay on Deterrence and its Implementation”	428
<i>Sutherland et al. v. The Hudson’s Bay Company et. al.</i>	435
<i>Potter v. Bank of Canada</i>	445

Volume 2**Chapter 5. CONSUMER PROTECTION CLASS ACTIONS**

Introductory Note	456
-------------------	-----

**A. *Contractual Ambiguity, Contra Proferentem and the Politicization
of Courts***

<i>Consumer Protection Act, 2002</i>	457
Recent Amendments to Ontario’s <i>Consumer Protection Act: Deeming Reliance for Misrepresentations Made to Consumers</i>	462
<i>Avery v. State Farm Mutual Automobile Insurance Company.</i>	463
Headnote, <i>Piercey Estate v. Atlantic Lottery Corp.</i>	466

B. *Automotive Replacement Part Litigation Salvage Cases*

Note on “Replacement Part Litigation” and Ontario	467
Introduction to the Ontario “Auto Salvage” Litigation: A Canadian Equivalent to <i>Avery</i> ?	467
<i>Segnitz v. Royal & SunAlliance Insurance Co. of Canada</i>	469

C. *Unauthorized Banking Charges*

<i>Cassano v. Toronto Dominion Bank, Ontario Court of Appeal, 2007</i>	472
--	-----

D. *Illegality – Criminal Interest Rate*

Introductory Note	491
Criminal Code, s. 347	492
An Act to Amend the Criminal Code. S.C. 2007, c. 9.	495

E. *Section 347 and Usurious Credit Card Charges*

<i>Markson v. MBNA Canada Bank</i>	497
------------------------------------	-----

F. *Payday Loans and Section 347*

Introductory Note	514
<i>Bodnar v. The Cash Store Inc.</i>	515

G. *Negligence Claims and Governmental Liability*

<i>Williams v. The Attorney-General of Canada et al.</i>	526
<i>Sauer v. Canada (Attorney General)</i>	551
Lisa Priest, “The Big Bluff”	558
Ontario Lottery and Gaming Corporation Self-Exclusion Form	562
Note on Crown Immunities and Class Actions	563

Chapter 6. CLASS ACTIONS AND MANDATORY ARBITRATION CLAUSES: THE BIG MUDDLE

Introductory Note	565
The New <i>Consumer Protection Act</i> Provisions Respecting "Arbitration Only" and "No Class Actions" Clauses	566
Headnote, <i>Union des Consommateurs c. Dell Computer Corp.</i>	568
Headnote, <i>Muroff c. Rogers Wireless Inc.</i>	571
<i>Griffin v. Dell Canada Inc.</i>	572
Mahmud Jamal “Consumer Class Actions and Arbitration: There is No Conflict”	581
Shelley McGill “A Comment on ‘Consumer Class Actions and Arbitration: There is No Conflict’”	590
Arbitration Fairness Act of 2009 – 111 th Congress, 1 st session, H.R. 1020	599
Note on the Exclusionary Powers of the Federal and Provincial Governments	606

Chapter 7. SETTLEMENT OF CLASS ACTIONS AND COUNSEL'S FEES

A. Introduction

Susan P. Koniak, "The Plight of Absent Class Members Denied Adequate Representation"	609
William G. Horton & Barrie R. N. Attzs, "The Class Action Settlement: An Overview"	611

B. Caselaw

Summary, <i>McCarthy v. Canada Red Cross Society</i>	631
<i>Annual Survey of Recent Developments in Civil Procedure</i>	633

C. Settlement and the Cy-près Doctrine

Settlement Agreement, <i>Smith Estate v. National Money Mart Co.</i>	638
Cullity J.'s judgment in <i>Cassano v. Toronto Dominion Bank</i> , July 2009	642

D. Remuneration of Counsel

Provisions of the <i>Ontario Class Proceedings Act</i> Respecting Fees	655
<i>Gagne v. Silcorp Limited</i>	657
<i>Directright Cartage Ltd. v. London Life Insurance Co.</i>	664
<i>Hislop v. Canada (Attorney General)</i>	666
Notes and Questions	677
<i>Wilson v. Servier Canada Inc.</i>	682

Chapter 8. COSTS, FEE SHIFTING AND CLASS ACTIONS

A. Introduction

Extract, Ontario Law Reform Commission's "Report on Class Actions"	700
--	-----

B. Statutory Provisions

Ontario and B.C. Statutory Provisions	708
---------------------------------------	-----

C. *Fee Shifting in Practice and Third Party Financing*

Philip Anisman and Garry Watson, “An Overview of Costs (Fee Shifting) in Canadian Class Actions”	711
Notes and Questions	714
<i>Pearson v. Inco Ltd.</i>	718
<i>Kerr v. Danier Leather Inc. (Ont. CA)</i>	723
<i>Kerr v. Danier Leather Inc. (SCC)</i>	724
Peter Senkpiel, “Third Party Litigation Funding of Class Actions in Canada”	730

Chapter 9. THE CHALLENGES OF NATIONAL CLASSES AND OVERLAPPING AND PARALLEL CLASS ACTIONS

Introduction – <i>Res judicata</i> basics	746
Ontario Class Proceedings Act s. 27	746
Garry Watson, “Res judicata and class proceedings”	747
<i>Currie v. McDonald’s Restaurant of Canada Ltd.</i>	749
Janet Walker, “Recognizing Multijurisdiction Class Action Judgments Within Canada: Key Questions – Suggested Answers”	765
<i>Lépine v. Société Canadienne des Postes</i>	775
Notes and Questions	778
Parallel and Overlapping Class Actions (and Carriage Motions)	778
<i>Settlington v. Merck Frosst Canada Ltd.</i>	779
The ULCC's Report on National Class Actions	786

Chapter 10. INTERNATIONAL AND COMPARATIVE PERSPECTIVES

Neil Andrews, “Multi-Party Proceedings in England: Representative and Group Actions”	808
Rachael Mulheron, “Reform of Collective Redress in England and Wales: A Perspective of Need”	821
Bernard Murphy, Camille Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia”	823

